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No. 94-90

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

WINCHESTER HOMES, INC.,
Petitioner,

v.

HOOVER UNIVERSAL, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Virginia

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REPLY BRIEF OF PETITIONER

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Respondents largely ignore the merits, while suggesting erroneously that Winchester Homes, Inc.'s ("Winchester")[1] Petition should be denied for two reasons: (1) that the federal issues implicated in this case were not presented below; and (2) that these issues do not warrant this Court's consideration. Despite Respondents' misguided assertions on these issues, however, the following is clear:

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[1] Winchester respectfully refers the Court to its Petition for a Writ of Certiorari for its Rule 29.1 Statement. Pet. for Cert. at ii.

1. Winchester raised the federal issues implicated in this case. App. to Pet. for Cert. at 31a-43a.[2]

2. The Respondents have ignored the fact that the standing issue was the first Assignment of Error presented to the Supreme Court of Virginia, wherein Winchester argued that the synergistic effect of the trial court's pre-trial and post-trial rulings not only deprived Winchester of standing, and thus access to the courts, but also deprived any other affected party standing to seek redress for a product already determined by a jury to be defective. As Respondents' own Brief in Opposition states, the Supreme Court of Virginia reviewed the case and held that there was "no reversible error in the judgment complained of" after undertaking a "review of the record in this case and consideration of the arguments submitted in support of and opposition to the granting of an appeal." App. to Pet. for Cert. at 1a.

3. To the extent that there was any delay in presenting the federal issues in this case to the Virginia State Courts, that resulted from the convoluted manner in which this case was handled by the Virginia trial courts, resulting in the two-tiered denial of Winchester's standing. Not until Winchester's standing had been totally denied by grant of J.N.O.V. after a jury trial and verdict against one of the Respondents—*and* after that ruling had been upheld by the Virginia court of last resort—was there a complete denial of access to the courts and Winchester's due process rights.[3] It is unreasonable to suggest that Winchester

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[2] Even Respondents concede—as they must—that Winchester's arguments "could be read" as implicating the due process and other federal issues for which certiorari is sought. Opp. at 8.

[3] It would have been inappropriate, if not disingenuous, for Winchester to assert that it had been deprived of its due process right of access to the courts before that point in time because it arguably still had access to the appellate court of the Commonwealth as an assignee of the homeowners. Once the highest state court made its decision in favor of Respondents, however, Winchester had been effectively deprived of its standing to pursue its claims further

could or should have anticipated that the Virginia Supreme Court would allow to stand rulings denying access to the courts by all parties affected by a defective product.

4. Furthermore, in seeking review of these issues by the Supreme Court of Virginia and in asking that court to grant an appeal, Winchester did indeed point out that the federal issues were not "new grounds of appeal." But rather than indicating that Winchester did not properly raise the federal issues below, as Respondents suggest, just the opposite is true. The Respondents have chosen to ignore Winchester's direct assertion that "the reversible error is so great as to violate Winchester's due process rights pursuant to . . . the 14th Amendment to the Constitution of the United States." App. to Pet. for Cert. at 40a-41a.[4] The italicized language found on page 5 of the Respondents' Brief in Opposition, which *follows* the above quotation, merely clarifies and better articulates that the denial of standing was a violation of due process.[5] Hence, Winchester has met its burden of "affirmatively" showing that the failure of the Virginia Supreme Court to expressly pass upon the federal issues presented to this Court was not due to want of proper presentation.

5. The federal issues having been raised with the Supreme Court of Virginia, this Court has the power to

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against Respondents in the Virginia courts—in its own right *and* as assignee of the homeowner.

[4] By stating that these arguments were not "new," Winchester did not mean to say—and did not say—that it was *not* raising these arguments.

[5] A careful reading of the *Herndon*, *Godchaux* and *McCorquodale* cases cited in the Respondents' Brief in Opposition reveal factual differences which make those cases distinguishable. Indeed, language in the *Herndon* case refutes Respondents' argument: "There is no doubt that the federal claim was timely if the ruling of the state court could not have been anticipated and a petition for rehearing presented the first opportunity for raising it." *Herndon v. Georgia*, 295 U.S. 441, 444 (1935).

review these claims and grant the Petition. Moreover, given the split among the Circuits and the importance of the issues raised in this Petition, the Petition should be granted.

Respectfully submitted,

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